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IN THE

# Supreme Court of the United States

**October Term, 1972**

No. 71-6648

LUIZ GONZALEZ,

*Petitioner,*

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Statement

Petitioner seeks a writ of *certiorari* to review a judgment of the Court of Appeals of the State of New York, rendered on February 10, 1972, unamimously affirming a judgment of the Appellate Division, Second Department, entered on December 21, 1970 which affirmed (one judge dissenting) a judgment of the Supreme Court of the State of New York, County of Kings, rendered on September 30, 1968, convicting petitioner for the crimes of assault in the first, second and third degrees and possession of a dangerous weapon and sentencing him to serve concurrent terms in a State Prison of 5 to 10 years on the assault 1 charge, 2½ to 4 years on the assault 2 charge, 3½ to 7 years on the dangerous weapon charge and 1 year, execution suspended,

on the assault 3 charge. The opinion of the Court of Appeals is reported in 30 N.Y. 2d 28 (1972) and is attached hereto as appendix "A". The opinion of the Appellate Division is reported in 35 A.D. 2d 980 (1970) and is attached hereto as appendix "B".

## Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C., sec. 1257 (3). It is contended that the petitioner's rights were violated in contravention of Amendments VI and XIV of the U. S. Constitution by depriving him of the effective assistance of counsel as a result of the alleged conflicting interests of appellant and his co-defendant who were represented by one attorney. Respondent's reply is that petitioner and his co-defendant had no conflicting interests and one attorney properly represented both.

## Statement

On December 19, 1967 petitioner was indicted by a grand jury of Kings County, together with a co-defendant, Efrain Rodriguez, in two indictments which on April 8, 1968 were consolidated for the purpose of a joint trial. One indictment charged petitioner with the crime of murder in the first degree on which he was acquitted, and the other charged him with the other crimes on which he was convicted. On June 10, 1967 George Luis Feliciano was shot and killed with a loaded firearm, resulting in the murder indictment. On June 10, 1967 Lorenzo Kindred was assaulted with a loaded firearm, resulting in the indictment on which petitioner was convicted.

An April 8, 1968, the trial was commenced before Honorable John R. Starkey, a Supreme Court Judge, and a jury.*

## People's Case

LORENZO KINDRED testified that on June 10, 1967, between 7:30 and 8:00 P.M., he was part of a group of people, including petitioner and his co-defendant Efrain Rodriguez, playing in a dice game. When petitioner and Rodriguez became broke and the game was at an end, they complained that the game had been "crooked" and demanded the return of their money (T 70-74, 75). He rejected the demand. After he had crossed the street and was standing on the stoop of his home, he was followed by petitioner, Rodriguez, and some others. Rodriguez pulled out a .22 or .32 caliber gun and "started the firing", while he was in a squatting position near his stoop. Whereupon he, too, fired one shot but his gun, a .22 caliber six-shot gun, jammed.** He tried unsuccessfully to fire more shots. Rodriguez fired in rapid succession four or five shots and ran away when, he believes, Rodriguez had no more bullets (77-79, 100, 104-05, 129). Thereafter, petitioner and others attacked him and took his gun from his hand. When his sister approached

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* The nature of appellant's contentions requires that the facts developed on the trial be set forth insofar as is pertinent to the assault indictment.

** Kindred admitted later to the police that he had a gun and as a result was arrested on an assault and gun charge. He pleaded guilty to assault against petitioner and Rodriguez. Aside from that he has never been convicted of a crime (122). The District Attorney's files show that Kindred was indicted and charged with assault one and assault two on Rodriguez and possession of dangerous weapons as a felony. On March 18, 1967 he pleaded guilty to possession of a dangerous weapon as a misdemeanor and no sentence was to be imposed until after his testimony in this case.

with a garbage can and struck one of his attackers with it, he was enabled to escaped. While escaping he heard a couple of shots and looking behind him, he saw a gun for the first time in the hand of petitioner (85-87, 119). No promises were made to him for his testimony (136-37).

SAMMY GASTON, 16 years of age, testified mainly with respect to the shooting of the deceased, a friend of his. He did hear petitioner and Rodriguez arguing with Kindred but could not hear what was said. Rodriguez pulled out a shiny object which was pointed toward Kindred but he cannot say whether or not it was a gun (146-47, 152). Later he said that before he entered a yard to seek shelter, he saw Kindred as well as Rodriguez pull out a gun (153, 168). He did not see anyone fire a gun but he heard the shots (155). Although he saw petitioner "make a motion" and "saw a shiny object," he at no time saw a gun in petitioner's hand (162).

ISNOEL RODRIGUEZ (not related to the co-defendant), 24 years of age, testified that on June 10, at about 8:00, looking out of a window in a third story apartment, he saw a dice game in progress. He heard an argument over money and the demand made by Rodriguez in the presence of petitioner for the return of his money (186-90). Rodriguez said "[I]f you don't give the money back I am going to shoot you," whereupon Rodriguez took out a gun and started shooting at Kindred. Kindred pulled out a gun from his pocket after Rodriguez had already taken out his, attempted to fire but no bullet came out. Petitioner was just a few feet from Rodriguez, "quite close," at that time (191, 206-07). Descending the staircase to the street, he saw a colored woman strike Rodriguez with a garbage can.

Petitioner took away Kindred's gun from him while a number of people were on top of Kindred (192-93).

OLGA LOPEZ, a sister of the deceased, Feliciano, testified that she noticed petitioner and Rodriguez arguing with Kindred. Rodriguez said "[G]ive me my money back or I'll kill you". Rodriguez took out his gun and fired in the direction of Kindred (231-33). Kindred pulled out his gun but it jammed (234). She saw the handle of a gun which petitioner was "trying to take out" (237). She then observed petitioner and Rodriguez jump on Kindred and take away his gun (238, 266-67). Kindred's sister approached and struck Rodriguez with a garbage can, at which point Kindred escaped (238). Although testifying at first on cross-examination that she did not see petitioner shoot at Kindred, she then stated that both petitioner and Rodriguez were shooting in the direction of Kindred.* She saw a gun in petitioner's hand (251, 253, 268).

ANTONIO QUINONES,** 14 years of age, testified that she observed petitioner, Rodriguez and Kindred engaged in an argument and she saw Rodriguez pull out a gun and point it at Kindred, in whose hands she did not see anything. She heard shots but by that time she had already escaped inside an alley (273-77, 291). Although she did not see anything in petitioner's hand, she saw him place his hand inside his jacket (280).

FRANK GLOVER, who has known Kindred for seven years and was engaged in the dice game, testified that Kindred

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* The testimony lends itself to the possible inference that she was referring to two intervals of time.

** She was with her little, handicapped brother who was in a wheelchair being pushed by the decedent.

and he had won a couple of dollars and walked across the street, followed by petitioner and Rodriguez, the latter of whom asked for the return of his money while simultaneously raising up his shirt. When Rodriguez pulled out his gun, Kindred ran down the block and when Rodriguez started shooting, Kindred pulled out his gun but it jammed. He then noticed petitioner on top of Kindred, who had in his hand a gun which petitioner took away from him. He saw Kindred's sister throw a garbage can top at Kindred's assailants. Kindred was then released and Rodriguez started shooting at Kindred's sister who was wounded. After that, he grabbed Kindred who was bruised and while he was running with Kindred, petitioner fired at him once (351-55, 384-86).

ANNA FELICIANO, sister-in-law of the decedent, testified that while sitting on the stoop in front of her house, she observed a dice game in progress across the street. When the game came to an end, Kindred crossed the street, Rodriguez and petitioner walking behind him. Rodriguez asked for the return of the dice and his money. Although petitioner told Rodriguez to ask for the return of $25, Rodriguez demanded only the return of $5. Kindred replied "[N]o, I was not cheating you". Rodriguez pushed Kindred, who started backing away. Rodriguez then took out a gun and shot wildly at Kindred who, too, took out a gun but it did not shoot. Petitioner also started "shooting crazy". Both Rodriguez and petitioner shot at Kindred (397, 419, 421, 430). Later, petitioner took away Kindred's gun from him and started shooting wildly with two guns. When the shooting foray was over, Kindred, who was running, was being chased and beaten. Kindred's

sister took a garbage can and struck petitioner with it, enabling Kindred to effect his escape (401).

ROBERT WILLIAMS testified that he was sitting on the steps of his house across the street from a dice game in progress. When it was over, participants, including Kindred, crossed the street. Kindred started to walk away when Rodriguez and petitioner walked up to him and engaged him in conversation. He heard Rodriguez say to Kindred, "I want my money back," claiming that the dice had been loaded. Rodriguez asked for the return of at least $5, contending that Kindred had won $25. Kindred replied: "Come on, let's take a walk". When they started walking towards the corner, Rodriguez pushed Kindred against garbage cans, and both Rodriguez and petitioner pulled out guns and started shooting in the direction of Kindred. Kindred reached into his pocket, removed a gun, tried to shoot with it but it did not shoot. After the shooting, they beat Kindred while he was on the ground. Rodriguez and petitioner, their guns still in their hands, dragged him across the street and beat him with a garbage can top. Kindred's sister ran out and swung at Rodriguez and petitioner with a broom. They then released Kindred, who started to run, fell, and was again grabbed. This time they took Kindred's gun out of his hand. After the gun was taken from Kindred, a shot was fired which struck Lorenzo Kindred's sister's arm (436-40, 453, 456, 474-77). After Kindred was released, Rodriguez and petitioner were running down the block, firing their guns perhaps eight or ten times (442-43).

JULIO SANTIAGO testified that he was in his automobile, stopped for a light on the corner, about a car and a half

length from the scene of the incident (535-36, 552). From his car, he witnessed an argument in progress between a Negro and a Puerto Rican. The Negro started walking away while the Puerto Rican was demanding $5. "Give me $5." The Puerto Rican tried to jump on the Negro who, however, jumped back towards a wall. The Puerto Rican then pulled out a gun from his shirt. As he started shooting, the Negro also pulled out a gun which did not fire. He cannot identify the Puerto Rican (537-38). He estimated the duration of his observation as 30 to 45 seconds, and when the light changed he proceeded in his car to pick up a police officer and return to the scene (553-54).

## The Defense

JUAN RIVERA, 20 years of age, a participant in the dice game, testified that Rodriguez asked a colored man, whose name he does not know, for the return of money which he had won by cheating. He was across the street at the time (565-68, 570). As Rodriguez was removing his coat, one of the colored men (there were two colored men present) shot at Rodriguez three times (569, 573). Rodriguez was "covering himself" and did nothing else (570). The colored man then ran away and several of the people, including petitioner, jumped on the colored man. During the struggle, a woman struck "him" with a garbage can (572-73). He never spoke to the police about this case and does not recall when he first spoke to defense counsel (574).

FELIX R. RODRIGUEZ, the co-defendant's brother, testified that two colored men were arguing with his brother, who claimed that crooked dice had been used. One colored man crossed the street but the other colored man continued the

argument with his brother and said that he did not have the money, did not win anything and that Rodriguez should see his colleague. He left his car and screamed at Rodriguez, "(T)hink what you are going to do". One of the colored men took out a gun and started to shoot while Rodriguez ducked. In self-defense Rodriguez also fired about four or five times. He believes the colored man's gun jammed after he had fired three shots. Although at first stating that he does not remember seeing petitioner at the scene, he later stated that the colored man went away, followed by petitioner and others (576-81, 585, 590).

LUIS GONZALEZ, petitioner, 26 years of age, testified that he has never been convicted of a crime and had known Rodriguez for about two-and-a-half months prior to June 10, 1967 (599). Frank Glover was throwing the dice when someone exclaimed "[T]hese dice are not good". Rodriguez remarked that if the dice were not good, his money would have to be returned to him (600-01). Kindred crossed the street. Rodriguez and Glover who were arguing also crossed over. Kindred fired two or three shots and his gun "stopped working". Rodriguez took out his gun and fired about four or five times. When Kindred's gun became jammed, Rodriguez's brother Felix and he tried to restrain Kindred, who was running at the time, by holding him. However, Kindred got loose of his grip, turned around, tried to shoot but the revolver again did not work (600-65). Continuing his run, Kindred stumbled. He wrestled with Kindred in an effort to take Kindred's gun away when a colored woman came and hit him on the back of his neck with a garbage can cover. However, he took Kindred's gun away from him, ran away with the gun in his hand and threw it into a yard (607-14).

LILLIAN RODRIGUEZ, wife of the co-defendant, testified that she observed her husband crossing the street together with petitioner and a colored man (627-28). The colored man took out his gun and fired two shots, when her husband took out his gun and fired about five times. The colored man then ran, with petitioner walking after him. She ducked behind some cars during the incident (627-30). Petitioner did not do any firing (632-34).

## POINT I

**Appellant and his co-defendant had no conflicting interests and one attorney properly represented both.**

Petitioner contends that early in the trial a conflicting interest became apparent between him and his co-defendant, Efrain Rodriguez, who were represented by one lawyer, and the Court *sua sponte* should have appointed additional counsel so that the interests of each defendant could be represented exclusively by individual counsel. At no time during the trial did petitioner, his co-defendant or their retained lawyer complain of the joint representation. We submit that a conflicting interest never became apparent during the course of the trial between petitioner and Rodriguez.

Petitioner and Rodriguez were charged in the indictment with "acting in concert" and each aiding and abetting the other. The testimony indicates that both men were in close proximity to each other within a "few feet, quite close" (191) during the entire affray, from start to climax. Several of the People's witnesses saw a gun in petitioner's hand; others did not. An apparently disinterested witness,

Robert Williams, seated across the street from the dice game and thus enjoying an excellent vantage point, saw both petitioner and Rodriguez shoot in Kindred's direction and saw both of them after the shooting beat Kindred, who was then on the ground. Two other witnesses—Olga Lopez and Anna Feliciano — saw petitioner shoot.* Williams testified further that it was the two defendants again who dragged Kindred across the street after the shooting and beat him with the top of a garbage can. When Kindred's sister swung at them with a broom enabling him to escape, both of them managed to grab Kindred again and took his gun away from him.** Both petitioner and Rodriguez ran down the block firing from guns perhaps eight or ten times and injuring the arm of Kindred's sister. Many other witnesses, including Kindred, testified to the fact that petitioner beat Kindred and took his gun out of his hand.

Petitioner arrogates unto himself the authority to decide which witnesses of the People to believe and which to disbelieve. Whoever he deems most damaging to himself is disbelieved and so he dismisses out of hand the testimony both of the disinterested witness, Robert Williams, and the sister-in-law of the decendent, Anna Feliciano, both of whom testified that petitioner, as well as Rodriguez, was shooting at Kindred. It, of course, is not petitioner's function to pass on the credibility of witnesses but the

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* Although Sammy Gaston testified that he at no time saw a gun in petitioner's hand, however he did see "a shiny object."

** Petitioner made much of the point in the Appellate Division that since the testimony showed Kindred's gun had jammed, there was no point in seizing it. However, a momentary jamming does not prove that the gun could not be made to fire, or the defendants wanted to wrest the gun, whether functioning or not at the moment, as a prize. In any event, they wanted to beat Kindred, and they succeeded.

function of the jury, and the jury heard the testimony of all the witnesses on both sides, and it is submitted that it was ample to prove the guilt of petitioner beyond a reasonable doubt.

Petitioner was intimately involved in the dispute between Rodriguez and Kindred. Both petitioner and Rodriguez, who were friends, believed that the dice game was won by Kindred because of crooked dice. Even if petitioner had no gun—which is not the evidence according to several of the People's witnesses—he could nevertheless be found guilty as an accomplice of Rodriguez. According to the testimony of witnesses both for the People and for the defense, Rodriguez had a gun and used it. Rodriguez and petitioner were close together at all times during the shooting spree. Even a defense witness, Juan Rivera, testified that Kindred later ran away from the scene of the affray and several people, including petitioner, jumped on him. Petitioner himself testified that he wrestled with Kindred, took Kindred's gun away from him and threw the gun into a yard. Lillian Rodriguez, wife of the co-defendant, and Felix Rodriguez, brother of the co-defendant, also testified that Kindred was running from the scene and petitioner was either "walking" after him or following him.

There is no dispute that petitioner, who was engaged in a dice game, felt aggrieved because of allegedly crooked dice used by Kindred and that he accompanied his co-defendant Gonzales to demand the return of his money. Both the People's witnesses and the defense witnesses are agreed on that score. Petitioner was bent on doing anything to attain his end. One witness testified that although Rodriguez demanded the return of $5, it was petitioner who told Rodriguez to ask for $25 (430). Upon Kindred's refusal

to submit to his ultimatum for the return of the money, war broke out. It is immaterial that several witnesses for the People did not see a gun in petitioner's hand but did see one in Rodriguez's hand. Three of the People's witnesses testified that petitioner had a gun and was shooting with it. The credibility of the witnesses is one for the jury and it is not for petitioner to pick whom he believes and disbelieves. But regardless of the issue of whether appellant had and wielded a gun, the charge against him is not dependent upon his possession of a gun. The charge against him is one of acting in concert with his co-defendant. The evidence is undisputed that after Gonzalez started shooting at Kindred, petitioner remained with Gonzalez at all times and continued his active participation in pursuit of Kindred and finally seized Kindred, beat him, and disarmed him. On his own testimony he then threw away Kindred's gun. The pursuit of Kindred by petitioner continued after Rodriguez had fired four or five shots at Kindred. Petitioner did not desist from further activity after witnessing Rodriguez's attempt to wound or kill Kindred with his gun. Even assuming *arguendo* that petitioner had no gun, if he actively participated with Rodriguez in pursuing Kindred after he was made aware of the firing of a gun by Rodriguez directed at Kindred, petitioner is equally culpable with Rodriguez as a full-fledged accomplice. Petitioner himself testified that Kindred opened fire and that Rodriguez then fired four or five times. He further testified that Kindred's gun jammed and that he subsequently took Kindred's gun away from him and threw it away. He had been to Rodriguez's home about two weeks before the incident and saw the gun in his home. (622-24). Of great significance in the testimony is the fact that both Kindred and Glover crossed

the street apparently in an effort to get away from Rodriguez and petitioner, but it was Rodriguez and petitioner who insisted on following them across the street where the action took place (602). Although Kindred was running away, petitioner together with Rordiguez's brother Felix pursued him. Petitioner's vengance was not yet expended but had to be wreaked even on a fleeing man. Finally, petitioner, who insists upon glorifying the testimony of the defense witnesses and those of the People's witnesses whom he deems satisfactory to himself, overlooks the fact that one of the defense witnesses, Juan Rivera, testified that he saw no firing at all by both defendants and claimed that they did nothing but cover themselves. The testimony of this witness should clearly be discounted, as it is in direct contradiction of the testimony by the other two defense witnesses, Felix Rordiguez and petitioner. The jury was apparently confronted with no difficulty in coming to the conclusion that petitioner, acting in concert with Rodriguez, had committed an assault upon Kindred because of the latter's refusal to return monies demanded of him. This is a reasonable inference flowing from all the testimony.

Petitioner argues that in the instance of Olga Lopez, he was clearly prejudiced because on direct examination she testified to a shooting only on the part of Rodriguez, but on cross-examination for the first time she implicated petitioner as well as Rodriguez in the shooting. He overlooks, however, completely the testimony on direct given by Miss Lopez that she heard petitioner as well as Rodriguez arguing with Kindred, and that she observed both petitioner as well as Rodriguez jump on Kindred and take away his gun. But most importantly, she testified on direct that she saw the handle of a gun which petitioner was "trying to

take out" (237). These facts testified to on direct examination were sufficient to involve petitioner as a conspirator with Rodriguez in the assault. The fact that on cross-examination she for the first time testified to her observation regarding appellant's shooting simply added more fuel to the fire. But it did not in any way change the picture to the detriment of petitioner.

We believe we have amply demonstrated that appellant and his co-defendant had no conflicting interests. The leading case, *Glasser* v. *United States*, 316 U.S. 60 (1941), cited by appellant, is inapposite. In that case one of the defendants, Glasser, specifically stated to the Court, "(I) would like to have my own lawyer representing me." His retained lawyer told the Court, upon appointing him to represent also the co-defendant Kretste, that certain conversations would be binding on Kretste and not on Glasser and that Glasser felt if the same lawyer also represented Kretste, "the jury would get the idea that they are together." 316 U.S. at 68. Despite this specific request, despite the fact that a conflict of interest was apparent between Glasser and the other defendant, the Court did not honor his request to have another lawyer appointed to represent Kretste. As the Supreme Court stated: "The possibility of the inconsistent interest of Glasser and Kretste was brought home to the Court but instead of jealously guarding Glasser's rights, the Court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights," 316 U.S. at 71. Nothing remotely analogous to this appears in the instant case. The courts have held that "(A)ppellant must show some conflict of interest between himself and the

other defendants represented by his attorney before he can claim successfully that the joint representation deprived him of his right to counsel". *U.S.* v. *Bentvena*, 319 F. 2d 916 (2d Cir., 1963). And it has been held that where a motion for a severance is made based on an alleged claim of a conflict of interests, a defendant "must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one . . . a trial court's refusal to grant severance will rarely be disturbed on review." *U.S.* v. *Borrelli* 435 F. 2d 500 (2d Cir., 1970). We submit that the principle which should govern this case is that enunciated in *People* v. *Cesare*, 30 A.D. 2d 868 (1968):

> In our opinion, there has been no persuasive showing of any such conflict of interest between the co-defendants. Moreover, our review of the record demonstrates that not only were the interests of the defendant not inconsistent as for example they might be in the case where each of the defendants has made statements exculpating himself and inculpating his co-defendant (cf. *People* v. *Sprinkler*, *supra*) but also the attorney's representation, which fully protected and preserved the rights of each defendant, was no less effective than it would have been if he had represented either defendant alone.

To find a conflict of interest on the basis of the record in this case would be in the words of the opinion rendered by the Court of Appeals in this case "tantamount to a holding that joint representation is, *per se*, a denial of effective assistance of counsel, a result not dictated by the Sixth Amendment." "[T]he mere fact that the co-defendants are represented by the same counsel is not grounds for

reversal." *People* v. *Cesare*, 30 A.D. 2d 868 (1968), aff'd. 27 N.Y. 2d 969 (1970). To the same effect see; *United States* v. *Dardi*, 330 F. 2d 316, 335 (1964), cert. den. 379 U.S. 845 (1964); *U.S.* v. *Bentvena*, *supra*, p. 937, *Gonzalez* v. *United States*, 314 F 2d 750, 752 (1963); *Englehart* v. *Commonwealth*, 353 Mass. 561, 562 and *People* v. *Dolgin*, 415 Ill. 434-438.

Most significantly, petitioner was represented not by assigned counsel but by retained counsel. At no point was any objection raised by anyone regarding this joint representation. We submit that it would have been an unwarranted interference with the attorney-client relationship for the Court to have interjected itself and to have suggested a mistrial during the course of the trial. It is not suggested at what point the alleged conflict of interest became apparent. Assuming *arguendo* that it did become apparent and that the Court suggested a mistrial and that both petitioner and his counsel objected to a mistrial, the *reductio ad absurdum* would be that the Court on its own motion would have to declare a mistrial and run the risk that an appellate court would declare the Court's action to have been unwarranted, thereby preventing the People from ever prosecuting petitioner again on the ground of double jeopardy.

Petitioner claims that the prejudice he suffered was not limited to the trial of the action but was also apparent in the sentencing procedure. In *Dukes* v. *Warden* ——*U.S.* ——(slip opinion, May 15, 1972), the appellant's attorney representing two co-defendants as well as the appellant on a charge unrelated to that in which the appellant entered a plea, made critical remarks in the other case about ap-

pellant when he argued for leniency of sentence for the two co-defendants. This Court rejected the claim of conflict of interest, noting that the appellant had *retained* his attorney, knew that he was representing two co-defendants in another case and never complained to the Court that he was not satisfied with his representation. Similarly, in the instant case petitioner retained his own attorney, knew that his attorney was representing a co-defendant and never complained about his representation.

At the sentencing proceeding in this case after the imposition of sentence, the sole reference by defense counsel to the possibility of a difference in treatment to be accorded between petitioner and his co-defendant was the following remark addressed to the Court. "Doesn't the Court feel that there is a difference between the two defendants with reference—with reference to the degree of punishment?" (Sentence Minutes, Sept. 30, 1968, p. 9). The Court's reply to this query is a very cogent one and points up the fact that petitioner, because he was acting in concert with his co-defendant, was equally guilty with him. The Court said:

> The Court: I don't, Mr. Ortiz. They were acting in concert. Rodriguez, it is true pulled out the gun and started to fire. Kindred drew a gun which he began to fire in return to Rodriguez. Rodriguez was not hit but Kindred was hit in the right side and the deceased boy tried to move the crippled boy in the wheelchair out of the line of fire. The bullet found in the deceased's body was a twenty-two caliber and Kindred admitted that he used a twenty-two caliber but Gonzales and others grabbed, fought and struggled and Gonzales succeeded in taking it from him after Kindred fell down. These two defendants, to my mind, are equally guilty.

(S.M., p. 9).

In support of the proposition that defense counsel's alleged position of "divided loyalty" lessened his effectiveness on petitioner's behalf at the sentencing procedure, petitioner cites two California cases. In addition to our argument that there was no conflict of interest in this case, we submit that the California cases (not binding upon this Court) are readily distinguishable. In both cases—*People* v. *Chacon*, 73 Cal. Rpt. 10 (1968) and *People* v. *Gallardo*, 74 Cal. Rpt. 572 (1969)—the defendants were not represented by retained counsel. Thus, in *People* v. *Gallardo, supra*, the public defender was assigned to represent both defendants. One defendant at the selection of the jury told the Court that there was a conflict of interest with his co-defendant. The attorney stated that both defendants were agreed that there was a conflict of interest but he did not see it. He went as far as calling one of the defendants a liar during the colloquy. The Court found as a matter of fact that there was a conflict of interest. In *People* v. *Chacon, supra*, a capital case, the Court assigned one lawyer to represent three defendants. The Court did not advise the defendants of their right to separate counsel if a conflict of interest was present and the appellate court would not imply from their silence a waiver of that right. The Court found that the facts of the case were "fraught with potentially effective individual defenses," 73 Cal. Rpt. at 16. In addition, because two defendants were sentenced to the chair (and one to life imprisonment) the Court stated: "Often the strongest argument that separate counsel can make on the issue of penalty is that his client was less culpable than the others and that he at least should not be executed." We do not believe that the strictures of the California Court on the joint representation by counsel

at time of sentence of two or more co-defendants would be extended to other than capital cases even in California. In any event, as indicated hereinabove, petitioner's counsel did seek to impress upon the Court a difference in culpability between petitioner and his co-defendant, but the Court properly concluded from the evidence that petitioner and his co-defendant were equally guilty.*

It is respectfully submitted that petitioner's premise of a conflict of interest, which would have necessitated the appointment of additional counsel in the midst of trial for the sole representation of petitioner and for the declaration of a mistrial even over the objection of petitioner, is without foundation in law or in fact.

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

Dated: Brooklyn, New York
June, 1972

Respectfully submitted,

EUGENE GOLD
*District Attorney*
*Kings County*

J. MITCHELL ROSENBERG
*Assistant District Attorney*
*of Counsel*

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* Defense Counsel on sentence argued that Rodriguez shot in self-defense and that petitioner never assaulted Kindred. "Gonzalez involvement in the case was only to the extent of an impulse to go to the aid of Rodriguez thinking that he was hurt, and to wrest the gun from Kindred and nothing else." (From opinion of the Court of Appeals, p. A-8).

# APPENDIX A

## Opinion of the New York Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* LUIS GONZALEZ, Appellant.

Argued November 30, 1971; decided February 10, 1972.

Crimes—assault—right to counsel—no error in permitting defendant to share retained attorney with his codefendant—no conflict of interest between defendant and codefendant—both had same interest in discrediting testimony of People's witnesses—counsel protected interests of both clients.

### POINTS OF COUNSEL

1. Defendant and his codefendant Rodriguez were convicted of the crimes of assault and illegal possession of a deadly weapon. About 10 individuals, including defendant and Rodriguez, were engaged in a gambling game when an argument occurred, in the presence of defendant, between Rodriguez and one Kindred, and, in the course of the argument, an innocent bystander was killed. The People's evidence tended to establish that both defendants shot at Kindred. Defendant claimed that Kindred fired the initial shots. The trial court, in permitting defendant to share a retained attorney with his codefendant, did not deprive defendant of his constitutional right to the effective assistance of counsel. There was no apparent conflict

of interest between defendant and his codefendant. Several of the People's witnesses testified that both defendants shot at Kindred and later beat him, and both defendants were accused in the indictments with "acting in concert" and "aiding and abetting" each other in the commission of the crimes charged. Both defendants had the same interest in discrediting the testimony of the People's witnesses.

2. Moreover, the record shows that counsel, in addition to arguing that Rodriguez acted in self-defense, contended that defendant never shot at Kindred, and that he never assaulted Kindred. The record establishes that counsel was thorough and diligent in preparing this case and protecting the interests of both of his clients.

*People* v. *Gonzalez*, 35 A D 2d 980, affirmed.

APPEAL, by permission of a Justice of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court, entered December 21, 1970, affirming a judgment of the Supreme Court (JOHN R. STARKEY, *J.*), rendered in Kings County upon a verdict convicting defendant of the crimes of assault, in the first, second and third degrees and illegal possession of a deadly weapon.

*David H. Smith* and *Robert Kasanof* for appellant. The trial court improperly permitted a single attorney jointly to represent appellant and his codefendant since appellant and codefendant had conflicting interests. (*Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Hayman*, 342 U. S. 205; *People* v. *Byrne*, 17 N Y 2d 209; *Randazzo* v. *United States*, 339 F. 2d 79; *Porter* v. *United States*, 298

F. 2d 461; *United States* v. *La Vallee*, 282 F. Supp. 968; *Taylor* v. *United States*, 226 F. 2d 337; *Application of Buffalo Chief*, 297 F. Supp. 687; *Ford* v. *United States*, 379 F. 2d 123.)

*Eugene Gold, District Attorney* (*J. Mitchell Rosenberg* of counsel), for respondent. Appellant and his codefendant had no conflicting interests and one attorney properly represented both. (*Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Hayman*, 342 U. S. 205; *United States* v. *La Vallee*, 282 F. Supp. 968; *Taylor* v. *United States*, 226 F. 2d 337; *United States* v. *Bentvena*, 319 F. 2d 916; *United States* v. *Borelli*, 435 F. 2d 500.)

OPINION PER JASEN, *J.*

JASEN, *J.* The sole question presented upon this appeal is whether the appellant was deprived of his constitutional right to the effective assistance of counsel.

Appellant and his codefendant, Efrain Rodriguez, were arrested on June 11, 1967, and subsequently charged in two indictments with the crime of murder in the first degree, the crimes of assault in the first, second and third degree, and illegal possession of a deadly weapon. After a jury trial both of the accused were acquitted of the murder charge, but were convicted of the other charges.

On June 10, 1967, about 10 individuals, including appellant and Rodriguez, were engaged in a game of craps. The game had been in progress for some time when one Lorenzo Kindred and a friend of his, Frank Glover, joined the game. They played for approximately 15 to 20 minutes, after which the game ended with Kindred and

Glover the principal winners. An argument thereupon ensued, in the presence of appellant, between Rodriguez and Kindred, in which Rodriguez, complaining that "crooked" dice were used in the game, demanded the return of his money.

Precisely what occurred after the commencement of that argument, which resulted in the killing of an innocent bystander, was sharply disputed at the trial. The People's evidence, consisting primarily of the testimony of Kindred and several other witnesses who observed the argument and subsequent events, tended to establish that Rodriguez pulled out a gun and started shooting at Kindred, and that appellant also shot at Kindred in addition to physically assaulting him. At the close of the People's case, appellant took the stand and gave his version of the events. He claimed that Kindred fired the initial shots. While he denied shooting at any time at Kindred, appellant did state that he tried to restrain Kindred "so that he could not keep on firing." The appellant's version as to how the shooting started, and his actions following it, were substantiated by the testimony of three witnesses.

Upon this evidence, the jury acquitted both defendants of the murder charge, but convicted them of the other afore-mentioned charges.

On this appeal, the appellant asserts that the trial court, in permitting him to share a retained attorney with his codefendant, deprived him of his constitutional right to the effective assistance of counsel. Specifically, appellant contends that early in the trial a conflicting interest became apparent between him and his codefendant which required the court to take necessary steps to protect his

right to effective representation.[1] Appellant does not suggest that this court adopt the rule in *Ford* v. *United States* (379 F. 2d 123), which presumes a conflict of interests when two or more defendants are represented by one attorney. What appellant does seek is that we examine the conflict of interests which he claims existed with respect to this appellant, and apply the applicable and previously announced constitutional rules thereto. In support of this view, he cites *Glasser* v. *United States* (315 U. S. 60); *United States* v. *Hayman* (342 U. S. 205); *United States ex rel. Williamson* v. *La Vallee* (282 F. Supp. 968); and *Taylor* v. *United States* (226 F. 2d 337, revg. 126 F. Supp. 764).

In *Glasser* v. *United States* (*supra*), the Supreme Court in setting aside a conspiracy conviction against the defendant Glasser, addressed itself directly to the Sixth Amendment ramifications of joint representation. Glasser and another defendant, Kretske, were represented at the trial by the same attorney, although Glasser had objected to sharing his lawyer with Kretske. Despite Glasser's objection and the attorney's notice to the court that the defenses may be inconsistent, the Trial Judge, nevertheless, designated Glasser's personal attorney as counsel for codefendant Kretske. After enumerating the various ways in which Glasser had been significantly prejudiced, the Supreme Court determined that his Sixth Amendment rights had been violated.[2] The rule that emerged from

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1. At no time during the trial did the appellant, his codefendant, or their lawyer complain that their defense was hampered by the fact that they were jointly represented.

2. The court, however, sustained Kretske's conviction, as there was no showing that he had been prejudiced by the joint representation.

*Glasser* is that where a conflict of interests is shown, the courts need not precisely calculate the degree of prejudice in order to find a violation of Sixth Amendment rights. (See, also, *Commonwealth ex rel. Whitling* v. *Russell*, 406 Pa. 45, 48; *People* v. *Ware*, 39 Ill. 2d 66, 68; *State* v. *Tapia*, 75 N. M. 757, 760.)

In *United States* v. *Hayman* (*supra*), a principal witness against the petitioner was a defendant in a related case wherein she had pleaded guilty but testified against the petitioner before sentence, and was represented by the same attorney as the petitioner. Likewise, in *United States ex rel. Williamson* v. *La Vallee* (*supra*), the attorney for the petitioner also represented an important prosecution witness, a defendant in another case. In *Taylor* v. *United States* (*supra*), the petitioner was represented by counsel also representing the prosecution's witness, an informer, as a defendant in another case.

One need not tax his imagination to detect the potential dangers that faced the petitioners in these cases when defended by an attorney who is also representing an important prosecution witness as a defendant in another case. In all of the cases relied upon by the appellant, a persuasive showing of a conflict of interests was made. (Cf. *People* v. *Wilkins*, 28 N Y 2d 53.) The holdings are consistent with the rule that has developed that "an appellant must show some conflict of interest between himself and the other defendants represented by his attorney before he can claim successfully that the joint representation deprived him of his right to counsel." (*United States* v. *Bentvena*, 319 F. 2d 916, 937 [2d Cir.]; *Glasser* v. *United States*, 315 U. S., at pp. 72-76; *United States* v.

*Dardi*, 330 F. 2d 316, 335 [2d Cir.], cert. den. 379 U. S. 845; *Gonzales* v. *United States*, 314 F. 2d 750, 752 [9th Cir.]; *Englehart* v. *Commonwealth*, 353 Mass. 561, 562; *People* v. *Dolgin*, 415 Ill. 434, 448; cf. *People* v. *Wilkins*, 28 N Y 2d 53, 55-56, *supra*.)[3]

But, even where such a conflict of interest is found to exist and, as a result, one of the defendants is prejudiced, this does not automatically inure to the benefit of his co-defendants, unless they, too, were in some manner harmed by the fact that they were represented by the same attorney. (*Kruchten* v. *Eyman*, 406 F. 2d 304; *Janovic* v. *Eyman*, 406 F. 2d 314; *Campbell* v. *United States*, 352 F. 2d 359; cf. *People* v. *Byrne*, 17 N Y 2d 209, 216.) In the *Campbell* case, for instance, the court reversed the conviction of Glenmore, one of the defendants, for the reason that he had been "clearly prejudiced" (p. 361) by the joint representation, but affirmed the conviction of Campbell, his codefendant, stating (p. 361): "we are unable to perceive anything indicating that his defense suffered from sharing an attorney with Glenmore."

In the case before us, we conclude that there was no apparent conflict of interest between the appellant and his codefendant. Contrary to appellant's contention, both defendants has the same interest in discrediting the testimony of the People's witnesses. Several of these witnesses testified that both defendants shot at Kindred and later beat him. It is immaterial that other witnesses for the People did not

3. See, also, *United States* v. *Youpee* (419 F. 2d 1340, 1345-1346 [9th Cir.]); *United States* v. *Long* (415 F. 2d 307, 308 [6th Cir.]); *Curry* v. *Burke* (404 F. 2d 65, 67 [7th Cir.]); *State* v. *Reppin* (35 Wis. 2d 377, 386-387); *Commonwealth ex rel. Corbin* v. *Myers* (419 Pa. 139, 141, 423 Pa. 243, cert. den. 386 U. S. 1013).

see a gun in appellant's hand, but did see one in the codefendant's hand, since both defendants were accused in the indictments with "acting in concert" and "aiding and abetting" each other in the commission of the crimes charged. The evidence is undisputed that after Rodriguez started shooting at Kindred, appellant remained with Rodriguez throughout the fracas and continued his active participation in pursuit of Kindred, culminating in appellant's seizure of Kindred, beating him and disarming him. At this point his own testimony reveals that he threw away Kindred's gun and continued to pursue him after Rodriguez had fired four or five shoots at Kindred. It should be obvious that even if we were to assume *arguendo* that the appellant had no gun, the evidence is overwhelming that he actively participated with Rodriguez in pursuing Kindred after he was made aware of the firing of a gun by Rodriguez directed at Kindred. Thus, we can perceive of no conflict in the appellant and Rodriguez as both had the same interest in discrediting the testimony of the People's witnesses, and it is to be noted their lawyer pursued that course vigorously through cross-examination and the use of prior inconsistent statements.

Appellant also argues that his attorney was unable in summation to argue that "Rodriguez assaulted Kindred, but that appellant was innocent of any assault on Kindred" because he also represented Rodriguez, and, consequently, a conflict of interest was present. The record, however, shows that counsel, in addition to arguing that Rodriguez acted in self-defense, did, in fact, contend that appellant never shot at Kindred, and that he never assaulted him, "Gonzalez's involvement in the case was only to the extent

of an impulse to go to the aid of Rodriguez thinking that he was hurt, and to wrest the gun from Kindred and nothing else." In no respect did the individual defenses of appellant and his codefendant run afoul of each other, nor did the efforts of counsel on behalf of Rodriguez interfere with appellant's defense.

In sum, a careful review of the record discloses no conflict of interests. To the contrary, the record establishes that counsel was thorough and diligent in preparing this case and protecting the interests of his clients. A finding of a conflict here, in effect, would be tantamount to a holding that joint representation is, per se, a denial of effective assistance of counsel, a result not dictated by the Sixth Amendment. Moreover, for the Trial Judge to have intervened in this case (see *Glasser* v. *United States*, 315 U.S., at pp. 71-72; *People* v. *Byrne*, 17 N Y 2d; at pp. 215-216) would have been an entirely unwarranted interference with the attorney-client relationship and might well have constituted an infringement upon the defendant's right to retain counsel of his own choosing. (Cf. *Chandler* v. *Fretag*, 348 U.S. 3, 9; *Powell* v. *Alabama*, 287 U.S. 45, 53; *People* v. *Silverman*, 3 N Y 2d 200, 202; *People* v. *Price*, 262 N.Y. 410, 412.)

The order should be affirmed.

Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, BREITEL and GIBSON concur.

Order affirmed.

# APPENDIX B

**Order of Affirmance, with dissenting memorandum, of the Appellate Division, Second Department.**

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LUIS GONZALEZ, Appellant.—Judgment of the Supreme Court, Kings County, rendered September 30, 1968, affirmed. No opinion. Hopkins, Acting P. J., Latham, Brennan and Benjamin, JJ., concur; Martuscello, J., dissents and votes to reverse the judgment and to grant a new trial on the ground that there was a conflict of interest between appellant and his codefendant and the trial court should have appointed different counsel for each defendant.